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Supreme Court of the United States

MARCINE PALKOVIC,

Petitioner,

v.

MICHAEL J. JOHNSON, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, AVERILL PARK CENTRAL SCHOOL DISTRICT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the government violate petitioner's right to due process of law when, after having lost a constitutionally mandated hearing, it failed to obey that decision and simply retried her on the same issue before a new hearing officer less than a year after the first hearing?

2. In light of the more rigorous standard of pleading adopted in *Twombly* and *Iqbal*, should denial of a motion to dismiss require that, if the facts and the law are the same at the summary judgment stage, the motion for summary judgment likewise be denied?

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OPINIONS BELOW

The decision below was issued by the United States Court of Appeals for the Second Circuit on December 9, 2009. It is not reported though it is available at 2009 U.S. App. LEXIS 26732. (App. A) The Second Circuit affirmed the decision of the United States District Court for the Northern District of New York granting defendants summary judgment, which was read in open Court on March 25, 2009. (App. B)

Also relevant is the decision of the United States Court of Appeals for the Second Circuit issued on June 13, 2008 and reported at 281 Fed. Appx. 63. (App. C) The Second Circuit reversed the decision of the United States District Court for the Northern District of New York which had granted defendants' motion to dismiss for failure to state a cause of action on August 20, 2006, which was reported at 451 F.Supp.2d 448.

The case has been before the United States Court of Appeals for the Second Circuit three times. On September 22, 2005, the Second Circuit, in an opinion reported at 150 Fed. Appx. 35, reversed the decision of the United States District Court for the Northern District of New York which had granted defendants' motion to dismiss on grounds of the statute of limitations which was read in open Court on September 24, 2004.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Second Circuit denied the petition for rehearing and rehearing *en banc* on February 4, 2010. (App. D)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. 14, § 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

42 U.S.C. § 1983. Civil action for deprivation of rights:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Introduction

This is a very strange saga in which Marcine Palkovic never seems to receive the benefit of any decision in her favor. She won a hearing reinstating her as an elementary school teacher, but her school refused to obey the decision. She won a decision of the United States Court of Appeals for the Second Circuit which agreed that her complaint stated a cause of action for violation of her right to due process of law, but that decision too failed to provide her with anything but a pyrrhic victory. The Courts subsequently ignored the reasoning of the Second Circuit's decision on the motion to dismiss, and even though there was no change in the law or the applicable facts, granted defendants' motion for summary judgment.

Facts

Marcine Palkovic was a tenured elementary school teacher from 1986 to 1994. She lost time due to surgery in 1994 and, in succeeding years, her professional performance was criticized. On April 16, 2007, she was accused of mental incompetence. [JA94-96, 234, 324]. A hearing was held to determine her mental competence to teach.

> On August 23, 1999, the hearing officer at the first section 3020-a proceeding issued a comprehensive decision holding that the "District has failed to prove that [Palkovic] is mentally incompetent. . . ." . . . The hearing

> officer found that Palkovic 'had been subjected to continued attack by the various personnel of the District and that her reaction was not proven to be a demonstration of paranoid disorder and obsessive compulsive traits.'"

281 Fed. Appx. at 65. Hearing Officer Markowitz suspended Ms. Palkovic for the 1999-2000 school year to give her the opportunity to improve her teaching performance upon her return to duty. He also warned the School District to stop harassing Ms. Palkovic. [JA334-335] The hearing before Markowitz will be referred to herein as Hearing 1. There were two other subsequent hearings that will be referred to sequentially as Hearing 2 and Hearing 3.

Defendants did not implement the Hearing 1 decision. On December 9, 1999, they requested that the New York State Department of Education revoke Ms. Palkovic's teaching license. They cited events that occurred in 1998 before the testimony had closed in Hearing 1 but were never submitted in evidence to the hearing officer. The State Education Department took no action. [JA98]

After that effort failed, on March 30, 2000, the District scheduled Ms. Palkovic for another mental examination. It sent the psychiatrist, Dr. Steven Kronick, the reports of all experts who testified in Hearing 1 and a copy of Hearing Officer Markowitz's decision. It asked Dr. Kronick for his opinion whether "she is mentally competent to teach in the schools of the [District]." [JA99] This was the very same issue already decided in Hearing 1.

Plaintiff did not appear on the date scheduled for the mental examination, citing her need to obtain legal counsel. So the District initiated a second set of 3020-a charges against her for failing to appear at the examination. After the conclusion of the proof in Hearing 2, Hearing Officer Lawson found that New York law gave respondents absolute discretion to require mental examinations but criticized the District for requesting that Palkovic submit to additional mental examinations on issues just decided in Hearing 1 and imposed no penalty.[1] [JA798-801]

On May 5, 2000, Dr. Kronick interviewed her, just as the experts who testified in Hearing 1 had

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[1] A teacher who loses a § 3020-a proceeding cannot challenge any legal errors committed during the course of the proceeding. Like the unsuccessful grievant in a private arbitration, a public school teacher must seek review under CPLR Article 75, in which the only grounds for setting aside the decision are "corruption, fraud or misconduct," "partiality of an arbitrator," or that the arbitrator acted outside the scope of his authority. CPLR § 7511; Education Law § 3020-a(5). *See also New York City Transit Authority v. Transportation Workers Union of America*, 99 N.Y.2d 1, 750 N.Y.S.2d 805 (2002) (public policy grounds for setting aside arbitration awards severely limited). The extreme deference to arbitration awards mandated by Article 75 makes it an inappropriate vehicle for litigating constitutional issues, such as the due process claim made in this case. In any event, "[t]he plaintiff . . . was not required to exhaust her state remedies or seek state judicial verification that her termination violated due process prior to bringing this action." *Halpern v. Bristol Board of Education*, 52 F.Supp.2d 324, 331 (D.Conn. 1999) (§ 1983 action challenging manner in which a school district conducted the teacher disciplinary hearing process under the Connecticut analogue to § 3020-a), *aff'd*, 208 F.3d 203 (2nd Cir. 2000).

interviewed her previously. He also asked a Dr. Smith to administer the very same battery of psychological tests that had already been administered by the other experts who testified in Hearing 1. [JA392, 393]

Drs. Kronick and Smith found her mentally incompetent using the very same methodology employed by the experts who testified in Hearing 1. Defendants then, on June 14, 2000, initiated a third § 3020-a proceeding against Ms. Palkovic, setting the stage for Hearing 3. There was only one charge to be adjudicated at Hearing 3: was she mentally incompetent to teach. [JA404]

Hearing Officer Lawson could have presided over Hearing 3, as his decision had not yet been released when the proceeding was initiated. [JA802] But defendants did not let him and shopped around for a hearing officer more likely to do their bidding. "The District, however, believed Lawson was 'not the hearing officer we want,' and suggested they 'work hard to get the most favorable hearing officer possible for the charge of 'unfit to teach.'" 281 Fed. Appx. at 65 (quoting from a written memorandum from the Superintendent of Schools to the Board of Education). [JA402]

After the third § 3020-a proceeding was initiated, a desperate Ms. Palkovic telephoned several witnesses who had testified against her in the first § 3020-a proceeding and tried to convince them to recant. The telephone calls had nothing to do with the upcoming hearing. These individuals were not scheduled to testify (nor did they testify) in Hearing 3. Nor were they

germane to the charge. They were witnesses to Ms. Palkovic's classroom behavior who had previously testified on that issue in Hearing 1. Hearing 3 did not relate to classroom performance, as Ms. Palkovic had not been in the classroom, but strictly concerned the validity of the Kronick/Smith projections on mental incompetence. Ms. Palkovic admitted calling them because she thought she won the first § 3020-a proceeding, she saw no hope she would ever be allowed to return to work free from the harassment that Markowitz warned against, and she wanted to get statements from them that she might be able to use in trying to get a job in another school. [JA913-914]

Ms. Palkovic's reaction was the product of her experience. Markowitz described her as "pellucid on the question of the attitudes of her co-workers." [JA331] "Instead of taking timely corrective action, the District exacerbated Palkovic's problems by subjecting her to two years of gossip, peer note-taking and clandestine meetings. It must bear some, but not all, responsibility for inducing the stress that contributed to Respondent's classroom difficulties in 1995-96." [JA334] In other words, Markowitz found that plaintiff was not paranoid in believing defendants were out to get her. They really were out to get her. And, they proved this over and over when, instead of obeying the decision in Hearing 1, they responded by bringing proceedings against her before the Commissioner of Education and by convening Hearings 2 and 3.

Prior to Hearing 3, plaintiff's attorney asked Hearing Officer Campagna to dismiss the charges. But he ruled that the Markowitz decision was not

res judicata because of the incontrovertible proposition that mental states can change. [JA829] The District, however, introduced no evidence at Hearing 3 that Ms. Palkovic's mental state had in fact deteriorated.

Both Kronick and Smith testified repeatedly and frankly that they brought nothing new to the table. Ms. Palkovic's mental state was fixed and unchanging since long before the Markowitz decision; they had no new evidence of mental instability; they agreed with the District's experts who testified in Hearing 1; they discounted the other experts' opinions who testified for Ms. Palkovic; and they believed Markowitz did not reach the correct conclusion. They never testified to a changed mental state – just that they agreed or disagreed with one expert more than another, and they re-interpreted Markowitz's findings to be consistent with the diagnosis of mental illness. They did nothing more than re-write the Markowitz decision. [A466, 471, 479-483], as Dr. Kronick frankly admitted. "I thought he showed rather limited psychological awareness, so I did differ. . . . I did not feel the medical data that he reviewed supported his findings completely." [JA471]

Dr. Smith, on the other hand, established that the result in Hearing 1 was grounded in the uncertainties of his profession. He admitted that the psychologists who testified before Markowitz could have reasonably reached different conclusions from the same test results. [JA492, 500, 503, 506, 508]

The Principal of the Elementary School where Ms. Palkovic taught, as well as the Superintendent of Schools, admitted that they took no steps to prepare to reintroduce Ms. Palkovic into the classroom. The Principal revealed the motive behind Hearings 2 and 3:

she testified they simply had no intention to allow Ms. Palkovic back into teaching. [JA586-587, 647-648]

On this evidence, the third hearing officer concluded that Ms. Palkovic was unfit to teach. However, he found, as defendants conceded, that the telephone calls did not constitute misconduct. [JA844] He described Ms. Palkovic's telephone calls as "consistent with" the diagnosis of mental illness [AJ844-845] based on a single sentence to that effect in Dr. Kronick's testimony. [JA467].

Procedural History

On July 22, 2004, plaintiff filed this action alleging that:

> "defendants refused to accept the decision of the Hearing Officer in the first § 3020-a proceeding and commenced two other proceedings against her in an effort to discharge her from employment. The evidence at the third § 3020-a consisted simply of new expert reports disagreeing with the findings of experts and the hearing officer at the first § 3020-a hearing in which she prevailed. No new evidence or changed circumstances was cited. Defendants were bound to respect the findings of the first § 3020-a proceeding. Instead, before plaintiff was done serving the penalty imposed in the first § 3020-a proceeding, and instead of affording plaintiff the opportunity to prove herself in the classroom as directed in the first § 3020-a decision, defendants repeatedly initiated further § 3020-a proceedings until they achieved the result they desired. The due

> process clause of the Fifth and of the Fourteenth Amendment protects plaintiff from being continually retried and punished over and over again on the same basis."

[JA70-71]

Defendants moved to dismiss on the ground that the claim was barred by the statute of limitations. The District Court granted the motion, but its decision was reversed. *Palkovic v. Johnson*, 150 Fed. Appx. 35 (2d Cir. 2005).[2]

On remand, defendants moved to dismiss on the ground that the complaint failed to state a claim that plaintiff's due process rights were violated. The District Court granted the motion. It held that the third hearing was a fair proceeding, *Palkovic v. Johnson*, 451 F. Supp. 2d 448, 457 (N.D.N.Y 2006), but again its decision was reversed. *Palkovic v. Johnson*, 281 Fed. Appx. 63 (2d Cir. 2008). The Second Circuit ["Panel 1"] emphasized plaintiff's allegation that defendants failed to adduce any evidence at all that her mental state had deteriorated since the first hearing officer ruled she was fit to teach. *Id.* at 66.[3]

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[2] The District Court also dismissed the case on the merits *sua sponte* but was criticized by the Second Circuit for doing so without affording plaintiff an opportunity to address the issue. 150 Fed. Appx. at 37.

[3] The District Court decision rejected a variety of procedural arguments by defendants concerning various State Court proceedings which, defendants argued, precluded the Federal Courts from hearing the merits of this controversy. Defendants argued that this action was barred by the *Rooker-Feldman* doctrine and by principles of collateral estoppel. The District Court rejected those arguments, and defendants did not appeal.

Following remand, there was no discovery. All the evidence as to what had happened in Hearings 1, 2, and 3 was known. All documentary evidence and all hearing transcripts had been obtained prior to this litigation. Plaintiff moved for summary judgment and defendants cross-moved for the same relief. The District Court granted defendants' motion. This time, the Second Circuit ["Panel 2"] affirmed. Although Panel 2 agreed that defendants had not shown any deterioration in plaintiff's mental state since she was adjudicated fit to teach in Hearing 1, Panel 2 held that there was no due process violation because Hearing 3 was not a "sham or a pretense." *Palkovic v. Johnson*, 2009 U.S. App. LEXIS 26732 * 4 (2d Cir. 2009).

On December 23, 2009, plaintiff moved for panel reconsideration and rehearing *en banc*. The motion was denied on February 4, 2010.

REASONS FOR GRANTING THE PETITION

I. PETITIONER ALREADY HAD A CONSTITUTIONALLY MANDATED DUE PROCESS HEARING. THE GOVERNMENT WAS OBLIGATED TO ABIDE BY THE RESULTS OF THAT HEARING. A SECOND HEARING IN LESS THAN A YEAR ON THE VERY SAME ISSUE WITH THE VERY SAME EVIDENCE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 (1951), Justice Frankfurter, concurring, explained that there is no magic formula that can be applied in analyzing a case like Ms. Palkovic's:

> The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and

> more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.

Put more succinctly, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). On the other hand, "[n]ot every push or shove, even if it may seem unnecessary in the peace of judge's chambers, violates a person's constitutional rights." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973).

If, upon inquiry, any American on the street, of whatever political persuasion, be it conservative or liberal, not being colored in his or her opinion by knowing the parties to the controversy, would instantly regard a process as unfair, that's a pretty good indication that the procedure is constitutionally defective. If any American, not sitting "in the peace of the judge's chambers," would instantly regard the procedure as unfair, then it cannot be reduced to a mere push or shove.

In a situation where a citizen is constitutionally entitled to a hearing, every American would instantly recognize that a hearing is not fair if government is free to simply disregard the outcome. In other words, any American would naturally understand that if one of their fellow citizens wins a hearing against the government, the government cannot simply refuse to abide by an

unfavorable decision and convene a new hearing in the hope of winning on the second try (or on the third try, etc.). No one would regard that as due process.

The decisions of this Court have recognized that, to be fair, a hearing must have some value in determining the ultimate rights of the parties.

> While [t]he nature and form of such prior hearings, moreover, are legitimately open to many potential variations . . . , [s]ince the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. 'Due process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . before he can be deprived of his property. . . .

Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972).

In the present case, Hearing Officer Markowitz decided that the government's claim against Palkovic did not have validity. But his decision was not implemented in any way, shape or form. By convening Hearing 3 to adjudicate what had already been decided in Hearing 1, the government prevented Hearing 1 from being a "real test" of anything, and thus violated Ms. Palkovic's right to due process of law.

It is beyond dispute that the government had no grounds for convening another hearing on the same

issue. At the end of Hearing 2, an independent fact-finder chosen by the government itself reached the following conclusion:

> Palkovic was required to attend the April 913 psychiatric examination after being found by hearing officer Markowitz, seven months earlier, to be mentally competent. ***The reasons given for requiring the April examination are the same as those which occurred during the pendency of the earlier 3020a proceeding, the only difference being that staff and parents complained anew to Johnson in September 1999 about those incidents.***
>
> On April 18, 2000, when the District scheduled Palkovic to be examined, she was on a suspension from duty scheduled to last through August 2000. Because of that suspension, Palkovic was incapable in April and for at least another four months, of representing a threat to the well being of children attending public schools in the District. ***Given this, the District's desire to schedule another 913 mental competency examination is puzzling and it is also puzzling why the examination was scheduled near the mid-point of Palkovic's year long suspension.***
>
> The Markowitz decision was not appealed. Therefore, if seven months after receiving the Markowitz decision, the District was

> concerned with Palkovic's mental status and wanted a current 913 examination to safeguard the welfare of children, then why arrange for the examination five months prior to the time Palkovic was scheduled to return to her classroom?

[JA-798-799, emphasis added][4]

The Second Circuit (Panel 2) identified two grounds for distinguishing Hearing 1 from Hearing 3. First, it said the psychological evidence at Hearing 3 was different from Hearing 1. Second, it said that Palkovic acted to intimidate witnesses prior to Hearing 3 and therefore could have been disciplined on that ground independently of what Markowitz found. Neither of these grounds extinguished the government's obligation to abide by Markowitz's ruling.

The use of new experts in Hearing 3 does not justify scuttling the Markowitz determination. The new experts did not claim to apply some new and different methodology than had been used by the experts who testified in Hearing 1. They simply testified openly and honestly that they did not agree with Markowitz's findings and had a different opinion. It is disingenuous to regard this as new evidence.

> A new expert witness opinion based on the same facts available to the trial experts is not,

[4] The District Court, in granting defendants summary judgment, ignored this finding and cited to events which occurred before Hearing 1. Panel 2 of the Second Circuit did not adopt this portion of the District Court's reasoning.

> as a matter of law, new evidence. The new expert witness opinion is not the equivalent of new evidence, but is merely the newly discovered importance of existing evidence. "Merely recycling and reformulating existing information into a new format does not generate new evidence. Newly discovered evidence does not include a 'new appreciation of the importance of evidence previously known but not used.'"

State v. Block, 296 Wis. 2d 935 ¶ 7, 724 N.W.2d 273 ¶ 7 (Wis. Ct. App. 2006) (citations omitted).[5]

This concept is familiar to both bench and bar. If a personal injury trial took place to determine whether the plaintiff suffered injury, and orthopedists testified for and against, no Court would have the slightest patience for an attorney trying to set aside a defense verdict on the ground that a new orthopedist re-examined the patient post-trial and rendered a different opinion on the issue previously tried. Yet that is exactly the type of junk science that the Panel 2 decision sanctions in this case.[6]

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[5] *Accord, United States v. Joseph J.*, 40 Fed. Appx. 494, 496 (9th Cir. 2002); *Weetman v. Sullivan*, 877 F.2d 20, 23 (9th Cir. 1989); *Stewart v. Angelone*, 1998 U.S. App. LEXIS 10886 * 10 (4th Cir. 1998).

[6] The federal courts exclude expert testimony that is unreliable junk science. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). If hiring a new expert is all that is required to undo matters already decided, any decision based on expert testimony becomes inherently unreliable.

Plaintiff's assertion of a constitutional violation enhances rather than diminishes the force of her position. Hearing 1, unlike a personal injury trial, was constitutionally mandated, since plaintiff had a property interest in her employment. *Perry v. Sindermann*, 408 U.S. 593 (1972). Neither the government nor the lower Courts were free to scuttle the result simply because they did not like the person involved or the outcome. Due process "is not a fair-weather or timid assurance."

Hearing 3 simply revisited the issue that defendants had already lost in Hearing 1. Respondents defended their decision to convene Hearing 3 on the ground that they should have been permitted the opportunity to prove that Palkovic's mental state had changed. However, as Panel 2 recognized, and as Panel 1 emphasized, defendants never introduced "a scintilla of evidence in [Hearing 3] that [her] mental state had in fact changed." 281 Fed. Appx. at 66 (quoting complaint ¶ 42).[7]

The only new information brought to light at Hearing 3 was Palkovic's admission that she contacted some so-called "witnesses" and asked them to recant their testimony from Hearing 1, but this evidence was not material to the issue at hand. Palkovic's telephone calls to those individuals happened after Hearing 3 was convened, the individuals in question were witnesses

[7] A changed mental state is an important component in determining whether an accused's due process rights have been violated. For example, a person who has been released from a mental facility upon a finding of mental fitness for discharge cannot be recommitted unless there is a demonstration that the person's mental state has changed. *People v. Leonard HH*, 148 A.D.2d 75, 81, 543 N.Y.S.2d 998 (3rd Dept. 1989).

who testified in Hearing 1 concerning her teaching performance, her teacher performance was was not being evaluated in Hearing 3, and Palkovic's purpose in contacting them was to try to obtain statements she could use to escape from defendants' seemingly relentless pursuit of her and get another job. These telephone calls had no legal significance at the time. The third hearing officer found that the phone calls did not constitute misconduct.[8]

The third hearing officer described the phone calls as corroborating his finding of mental illness. However, corroborating evidence is only as good as the evidence it corroborates. It is meaningless to speak of corroboration with respect to the testimony of Drs. Kronick and Smith since they played a constitutionally illegitimate role in Hearing 3. They simply reinterpreted the evidence introduced at Hearing 1, rejected Markowitz's findings, and offered opinions identical in substance to the opinions given by different experts on the very same issue that was fully adjudicated in Hearing 1. Hearing 3 turned out to contain nothing valid to corroborate.[9]

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[8] There is tremendous irony in the degree of attention being paid to the phone calls. At worst, the phone calls demonstrate that plaintiff did not respond coolly to the extreme stress of having multiple disciplinary proceedings instituted against her. Her refusal to submit to her unique predicament does not justify labeling her as mentally ill any more than it would justify applying the same label to school officials because they refused to accept Markowitz's decision.

[9] Hearing 3 could not have been enjoined. The reaction of any Court would have been to await the testimony. The testimony turned out to be nothing more than a rehash of Hearing 1.

Markowitz heard all the testimony concerning Ms. Palkovic's behavior in the classroom. He found she had no mental illness and was not disqualified from teaching. He found the school had committed misconduct in its treatment of Ms. Palkovic and ordered respondents to stop harassing her. They ignored his decision, stepped up the campaign to get her out, and ultimately invited pure speculation as to how she would behave in the classroom. Not even defendants' own witnesses could defend this approach. Dr. Smith testified:

> [A:] If you are asking what is the ultimate test of anyone's ability to work; obviously a trail [sic] at the job is the ultimate test of anyone's ability to work. [Q:] My question was wasn't that the test that Professor Markowitz laid out? [A:] Yes. [Q:] Okay. And that test has not yet to be applied; correct? [A:] As far as I know.

[JA 503]

The due process issue raised in this case is necessarily an unusual one. The instances in which government refuses to abide by a decision in a constitutionally mandated proceeding are rare indeed. In one similar case, *Carter v. Harris*, 64 F. Supp. 2d 1182, 1189 (D. Ala. 1999), the Court explained:

> Here, the [government employer], faced with a finding and recommendation with which he disagreed, simply scuttled the hearing, rather than allowing an appeal, and ordered another

> one. For aught that appears from the evidence, he might have felt free to continue to do so, hearing after hearing, until some hearing officer "got it right." This makes a mockery of the right to a due process hearing. This court concludes, therefore, that [plaintiff] presented sufficient evidence to establish that there was a deprivation of a property interest without notice and a hearing.

Id. at 1189.

One panel of the Second Circuit followed this principle. One did not. And an important issue of Federal law is involved. American citizens cannot possibly have confidence in their constitutional rights if government is free to ignore the decision in a constitutionally mandated hearing and simply convene another one to retry the same issue.

In this regard, counsel for plaintiff recalls the movie *The Thin Blue Line*. It concerned a murder case in Texas where the police, in their zeal to charge someone for killing a police officer, arrested the wrong man who was convicted and sentenced to death. The accused's attorney was so dismayed with the procedural irregularities in the case that he quit the practice of law.

This case is not criminal, so the personal stakes are not as high (though plaintiff lost her career). However, the stakes for due process of law are just as high. It is completely bewildering that, under our constitutional regime, Ms. Paikovic has never succeeded in having the

decision of the first hearing officer in her favor respected in any way, shape, or form. Due process of law demands that it be given effect, even if the person seeking to do so is a teacher accused of mental incompetence.

II. IN *TWOMBLY* AND *IQBAL*, THIS COURT INTRODUCED GREATER RIGOR INTO THE ADJUDICATION OF A MOTION TO DISMISS. DENIAL OF A MOTION TO DISMISS, THEREFORE, SHOULD MEAN THAT, IF NEITHER THE FACTS NOR THE LAW ARE DIFFERENT AT THE SUMMARY JUDGMENT STAGE, THE MOTION FOR SUMMARY JUDGMENT SHOULD LIKEWISE BE DENIED.

This is a case involving multiple bites at the same apple. This Court has tried to streamline and make the litigation process more logical and efficient. When a litigant loses an argument on the law and the facts, it should not be permitted to re-litigate the same issue at every opportunity. This is inconsistent with this Court's teachings on civil procedure.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), this Court increased the level of factual precision necessary for a complaint to survive a motion to dismiss. No longer may a plaintiff assert general claims in its complaint and argue that it is "conceivable" for plaintiff to support those claims later with facts obtained in discovery. Rather, the plaintiff must allege sufficient facts in its complaint to show that its legal claim for relief was already "plausible" at the outset.

Of course, simply because a claim is plausible does not mean it will survive summary judgment. Plaintiff may not ultimately be able to prove the facts alleged in the complaint, or defendants may come forth with alternative facts that make plaintiff's claim untenable, thus entitling defendant to summary judgment.

What happens if, in defeating a motion to dismiss, plaintiff has advanced sufficient facts in its complaint, those facts are subsequently proven, and defendant advances no countervailing facts? Is it still possible for the defendant to have summary judgment on the same legal theory it unsuccessfully advanced at the motion to dismiss stage? If a decision denying a motion to dismiss constitutes a finding that the legal theory advanced in the complaint is sound based on facts assumed to be true, and those facts are proven true, how then can summary judgment be granted?

The history of American civil procedure suggests that a complaint deemed sufficient at the motion to dismiss stage cannot, in the absence of countervailing facts, suddenly become insufficient at the summary judgment stage. This would amount to the Court reversing itself without a finding that it was mistaken or wrong on the law. Consequently, "a Rule 56 motion may not be made on the same grounds and with the same showing that led to the denial of a previous motion to dismiss." 10A Wright & Miller, *Federal Practice and Procedure*, Ch. 8, § 2713 (Westlaw 2010). To revisit the same issue on summary judgment would be a complete waste of time and judicial resources, and lead to a very convoluted jurisprudence.

In *Twombly* and *Iqbal*, this Court was concerned that defendants waste time and expend unnecessary resources responding to non-meritorious claims. Plaintiffs share the same interest. If plaintiff's legal theory is unsound, the Court should so advise plaintiff at the outset, rather than having plaintiff continue to litigate for years in reliance on the Court's ruling as to the law at the motion to dismiss stage, only to have the Court later reverse field, and, after considerable resources have been spent, say, in effect, "we didn't really mean it."

In the present case, after the motion to dismiss was denied, there was no conceivable need for discovery. All the facts of the case were known at the motion to dismiss stage. Plaintiff alleged that defendants lost a constitutionally mandated hearing, failed to honor the decision against them, and proceeded to re-litigate the same issue before a new hearing officer. Plaintiff claimed her right to due process of law was violated because defendants failed to respect the result of a constitutionally mandated proceeding and simply revisited the same issue. The findings of Hearing Officer Markowitz are beyond dispute; it is likewise indisputable that his findings were never implemented; and what occurred at Hearing 3 cannot be denied, since the parties had the transcript from the time the complaint was filed.

Plaintiff's complaint contained numerous paragraphs quoting extensively from the testimony of Drs. Kronick and Smith at Hearing 3. [Complaint ¶¶ 36-37, JA32-33] For example, both testified that there had been no change in her mental condition from the time

of the first § 3020-a proceeding and that they simply disagreed with the conclusions reached at Hearing 1.

> It's been a consistent finding . . . it's [her mental illness] been present at least a few years prior to that [Hearing 1]. It's been an ongoing, stable, consistent pattern of — of how she interacts with her world. . . . I thought he [Markowitz] showed rather limited psychological awareness, so I did differ. . . . I did not feel the medical data that he reviewed supported his findings completely . . . [T]he nature of personality disorders is that they do not come and go like an infectious disease; they are persistent things that exist for the life of the individual.

[JA466, 471, 492] Dr. Smith admitted that he and Dr. Kronick simply disagreed with the result of Hearing 1. They "had nothing new; no new acts outside of [their] office and outside the Markowitz decision to rely on. . . ." [JA506][10]

Panel 1 recognized that the complaint was founded on an analysis of the testimony at Hearing 3. Panel 1 summarized the complaint as follows:

> "[t]here was no evidence in the third § 3020-a proceeding that plaintiff's mental state had deteriorated from the time of her initial § 913

[10] Drs. Kronick and Smith did not explain how plaintiff taught successfully for eight years with this ever-present mental illness.

> exam which resulted in the initiation of the first § 3020-a proceeding. Nor did [the District's experts] make a determination based on newly discovered evidence that was not available to the first § 3020-a hearing officer. Rather, they simply testified that they agreed with the findings of the District's psychiatric experts at the first § 3020-a hearing, that they diagnosed a mental condition already present at the time of the first § 3020-a hearing, and that they found hearing Officer Markowitz to be simply wrong, indeed not to understand psychological and psychiatric testimony."

Palkovic v. Johnson, 281 Fed. Appx. 63, 65 (2d Cir. 2008). Panel 1 ruled that plaintiff's complaint stated a claim for a due process violation that was "plausible on its face." *Id.*

Plaintiff's complaint contended in essence that there was no basis for retrying the issue of her mental competency in Hearing 3 in the absence of some showing that her mental state had deteriorated from the time of Hearing 1. Panel 1 expressed skepticism that defendants would be able to show a changed mental state, given the chronological sequence of events.

> Less than five months after that [Markowitz] decision, the District commenced a second proceeding to terminate her employment ("second section 3020-a proceeding"). Palkovic's second section 3020-a proceeding was assigned to hearing officer Eric Lawson. The District, however, believed Lawson was

> "not the hearing officer we want," and suggested they "work hard to get the most favorable hearing officer possible for the charge of 'unfit to teach'." Compl. at P 31. To that end, on June 14, 2000, the District commenced a third proceeding to terminate Palkovic's employment ("third section 3020-a proceeding"). The third section 3020-a proceeding was commenced less than two months after the District commenced the second section 3020-a proceeding, and less than a year after the first section 3020-a proceeding concluded.

Id.

On summary judgment, a different panel of the Second Circuit, Panel 2, simply reversed the earlier ruling that the complaint was sufficient. The second panel admitted that there was no evidence plaintiff's mental state had deteriorated, but relied on two "new facts" to differentiate its conclusion from the decision on the motion to dismiss: the "new" expert testimony presented at Hearing 3 and the phone calls to witnesses who testified at Hearing 1.[11]

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[11] At oral argument, a member of Panel 2 accused Ms. Palkovic of intimidating witnesses. Ms. Palkovic, however, spoke to no one who was scheduled to testify in Hearing 3 or whose testimony could conceivably have been relevant in Hearing 3. The third hearing officer found that the telephone calls did not constitute misconduct. Thus, in attaching greater significance to the telephone calls than the hearing officer did, Panel 2 engaged in its own factfinding, rather than fulfilling its duty to respect the determination of the hearing officer. Panel 2 only respected the third hearing officer when convenient.

The "facts" cited by Panel 2 do not negate Panel 1's decision. Panel 2 did not identify anything factual in the testimony of the experts at Hearing 3 that would make their testimony any different in kind from the experts who testified at Hearing 1. The experts at both Hearings 1 and 3 all used the same methodology and expressed the same opinions: some testified in support of plaintiff's mental competence and some against. The purpose of Hearing 1 was to resolve the "battle of the experts" and Hearing Officer Markowitz did so. There was no need for a remake called *Battle of the Experts II*. It was not appropriate for defendants to simply bring in new experts, have them testify they disagreed with Markowitz, and re-litigate an issue that was already decided in a constitutionally mandated proceeding. Thus, as a matter of law, there was no difference between the expert testimony at Hearing 1 and at Hearing 3.

Furthermore, plaintiff's complaint explicitly acknowledged at the very outset of this case that defendants offered testimony from new experts and that she had made the telephone calls. [JA65-66 ¶¶ 30, 33-34, 36-37] In their motion to dismiss, defendants argued that these "facts" served to demonstrate that plaintiff's due process claim had no merit. Panel 1 rejected that argument and held that the complaint contained sufficient facts, if proven, to demonstrate that plaintiff's due process rights were violated. At the summary judgment stage, there were no new facts, just a different result, because Panel 2 had a different perspective as to the meaning of due process.

Panel 2's decision rested on an erroneous legal foundation. Panel 2 held that the result of Hearing 3

was legitimate so long as Hearing 3 was not a "sham or a pretense." This theory had previously been articulated by the District Court but Panel 1 rejected that theory. *Palkovic v. Johnson*, 281 Fed. Appx. 63, 65 (2d Cir. 2008). Panel 2 revived the District Court's error in limiting the inquiry to whether Hearing 3 was a "sham or a pretense" because Panel 2 fundamentally misunderstood the nature of the due process violation being claimed.

In the appeal before Panel 1, plaintiff never challenged the "reasonableness" of the third hearing officer's decision. In fact, plaintiff conceded that the decision was reasonable in the sense that, given conflicting expert testimony, different hearing officers could reach different conclusions as to the nature of plaintiff's mental state. Psychology or psychiatry is hardly such an exact science as to guarantee unanimity of opinion.

Plaintiff's due process rights were not violated because Hearing 3 was a sham or a pretense. Plaintiff's due process rights were violated because defendants never implemented the Hearing 1 decision, and plaintiff never engaged in any conduct that would have justified scuttling that decision. It is beyond dispute that defendants already scuttled the Markowitz decision and refused to implement it ***long before*** plaintiff made the telephone calls. In failing to abide by the result of a constitutionally mandated proceeding, and re-trying an issue already decided, defendants violated plaintiff's right to due process of law. Panel 1 saw that, according to the values-based approach articulated by Justice Frankfurter, plaintiff's constitutional right to due

process of law could be violated even if Hearing 3 could not be mechanically labeled as a "sham or a pretense."[12]

Defendants knew they were not entitled to try the same case again, which is why they convinced the third hearing officer to proceed on the premise that plaintiff's mental state had deteriorated. However, defendants failed to introduce any evidence of a changed mental state, so that Hearing 3 turned out to be nothing but a rehash of Hearing 1.

The facts of this case remained the same before Panel 2 on summary judgment as they had been before Panel 1 on the motion to dismiss. Defendants never brought forth any countervailing evidence to show that plaintiff's complaint mischaracterized what happened to Ms. Palkovic. Panel 2 conceded that there was no evidence of a changed mental state. Thus, the disparity between the two Second Circuit decisions cannot be explained as the result of routine differences between two distinct types of dispositive motions, but as the product of differing viewpoints on the meaning of due process that arose in some murky procedural waters.

This Court has attempted to bring greater intellectual rigor to the process of filing a complaint in Federal Court. It has tried to assure that the mere possibility of a claim does not become an invitation to

[12] One of the assertions frequently made in this case was "she received all the process she was due," or "teachers get enough due process," as if due process can be measured in the amount of hearings plaintiff had, rather than the content of what occurred. Here, one hearing was all that was needed to protect her due process rights.

conduct a fishing expedition to determine whether a claim exists. Conversely, there is no valid basis for concluding that the very same facts that established a valid claim at the pleading stage mysteriously could no longer do so at the summary judgment stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED DECEMBER 9, 2009

No. 09-1316-cv

MARCINE PALKOVIC,

Plaintiff-Appellant,

v.

MICHAEL J. JOHNSON, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, AVERILL PARK CENTRAL SCHOOL DISTRICT,

Defendants-Appellees.

December 9, 2009, Decided

JUDGES: PRESENT: JOHN M. WALKER, JR. , JOSEPH M. McLAUGHLIN , REENA RAGGI , Circuit Judges.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on March 25, 2009, is AFFIRMED.

Appendix A

Marcine Palkovic, formerly a tenured teacher with the Averill Park Central School District ("School District"), appeals from a grant of summary judgment in favor of defendants on her claim, pursuant to 42 U.S.C. § 1983, that the School District violated due process in terminating her employment. Summary judgment is proper only if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review an award of summary judgment *de novo*, "examining the facts in the light most favorable to the non-moving party and resolving all factual ambiguities in that party's favor." *Pyke v. Cuomo*, 567 F.3d 74, 76 (2d Cir. 2009). In applying this standard, we assume familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our ruling.

The due process clauses of the Fifth and Fourteenth Amendments require that "no person . . . be deprived of life, liberty, or property without reasonable notice and an opportunity to be heard . . . 'at a meaningful time and in a meaningful manner.'" *Karpova v. Snow*, 497 F.3d 262, 270 (2d Cir. 2007) (internal citation omitted) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). This constitutional guarantee pertains when public entities propose to dismiss a tenured teacher. *See Strong v. Bd. of Educ. of Uniondale Union Free Sch. Dist.*, 902 F.2d 208, 211 (2d Cir. 1990).

The gravamen of Palkovic's due process claim is that the School District was so determined to fire her that it

instituted successive disciplinary proceedings pursuant to New York Education Law § 3020-a until it achieved the desired result. She asserts that the 2001 proceeding that resulted in her dismissal based on mental incompetence — the third such proceeding instituted against her — subverted the outcome of the first, at which a similar charge was dismissed. The third proceeding was a sham, she contends, because the School District adduced no evidence beyond that introduced or available at the first hearing, conducted in 1998-99.[1]

We agree with the district court that Palkovic failed to raise a triable question of fact on her due process claim. The record demonstrates that the School District did adduce evidence at the third hearing that was not available at the first, notably (1) reports by two mental health professionals who examined Palkovic *after* the first hearing and concluded, based on those examinations, that she was then unfit to teach, and (2) testimony and reports that in the summer of 2000, Palkovic engaged in a disturbing campaign to persuade

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1. Palkovic advanced the related but distinct argument that the third hearing was barred by *res judicata* in a separate lawsuit filed in state court and ultimately dismissed. *See Palkovic v. Averill Park Cent. Sch. Dist.*, No. 41-0770-2001 (N.Y. Sup. Ct. Nov. 15, 2001). In rejecting Palkovic's claim, the state court relied on the fact that the arbitrator at the third hearing "was not merely re-sifting the evidence considered by the prior arbitrators, but was evaluating new evidence and found that especially in light of the old evidence it demonstrated petitioner's unfitness to teach." *Id.*, slip op. at 2-3.

witnesses who had testified at the first hearing to recant their testimony. As the third hearing officer aptly observed, while the campaign may not have qualified as misconduct, it was further evidence of a troubled mental state. Even if we were to accept Palkovic's contention that this evidence did not show a *deterioration* in her mental state between the first and third hearings, we would not find the summary judgment award unwarranted. Because the hearing officer was presented with, and relied upon, new evidence of Palkovic's unfitness for the classroom, a factfinder could not conclude that the third hearing was "a sham or a pretense." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring) (internal quotation marks omitted).

To the extent Palkovic suggests that our prior rulings in this case compel a different result, *see Palkovic v. Johnson*, 281 F. App'x 63 (2d Cir. 2008); *Palkovic v. Johnson*, 150 F. App'x 35 (2d Cir. 2005), we do not agree. In 2008, we held that Palkovic had sufficiently stated a claim for relief precluding dismissal, but we expressly declined to reach the issue of whether Palkovic could adduce evidence sufficient to succeed on a procedural due process claim. *See Palkovic v. Johnson*, 281 F. App'x at 66. On summary judgment review of the evidence now adduced, we conclude, like the district court, that she has failed to raise a material issue of fact supporting her due process claim.

Appendix A

We have considered Palkovic's other arguments on appeal, and we conclude that they are without merit. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B — EXCERPT OF ORAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED MARCH 25, 2009

[Commencing at page 30]

THE COURT: Thank you. Thank you for the excellent argument on both sides, but I am prepared to render a decision at this time.

In this action, plaintiff alleges that disciplinary charges brought by defendants, which culminated in a third disciplinary hearing, constituted a violation of her due process rights. Plaintiff appealed the grant of a second motion to dismiss. The Second Circuit Court of Appeals vacated the dismissal and remanded for further proceedings. Discovery was conducted. Plaintiff now moves for partial summary judgment. Defendants opposed and cross moved for summary judgment.

According to the decision of the Second Circuit, plaintiff stated a "plausible on its face" due process claim in that she alleged that there was no evidence in the third proceeding that her mental state had deteriorated from the initial Education Law Section 913 exam, that there was no evidence of a change in her mental state, and that Hearing Officer Campagna found her incompetent and unfit to teach based on the school's experts whose testimony was that plaintiff's disorder was fixed and permanent since before the initial Section 913 exam.

Appendix B

See, 281 Federal Appendix 63 (2d Cir. 2008), summary order, text at 2008 WL 2415274.

[31] In other words, if there was no new evidence regarding her mental state presented at the third hearing, or if evidence was presented at the third hearing that was available at the first hearing but was not presented previously, but a contrary result was reached, then the third hearing was not meaningful and violated her due process rights.

Therefore, the material factual issue is what new evidence regarding her mental state, not available at the first hearing, if any, was presented at the third hearing.

If, as plaintiff asserts, there was no material dispute that there was no change in the evidence regarding her mental state between the first hearing and the third hearing, then she is entitled to judgment as a matter of law. On the other hand, if, as defendants assert, the third hearing officer's decision was based upon new evidence regarding her mental state not available at the first hearing, then plaintiff received all the process that she was due, and defendants are entitled to judgment as a matter of law.

The first hearing officer found that there was only some evidence of plaintiff's mental illness but that the school district had not proved that her reaction to gossip and criticisms against her demonstrated paranoid [32] disorder and obsessive compulsive traits. The first

hearing officer found that plaintiff was guilty of various charges including incompetence, inefficiency, and neglect of duty, and that plaintiff refused to accept responsibility for her misconduct in the classroom.

However, he noted that if, in fact, plaintiff's alleged mental illness caused her initial problems, the School District exacerbated the problem by not calling for a Section 913 hearing sooner than it had. Accordingly, the first hearing officer penalized her only one year suspension without pay.

After the first hearing, the new superintendent of schools, Doctor Johnson, reviewed the situation and spoke with parents and teachers to better understand the situation. He learned of alleged threatening, bizarre behavior by plaintiff in relation to witnesses at the first hearing, and therefore asked the State Education Department to investigate. Another Section 913 mental examination was scheduled.

Plaintiff failed to appear for the scheduled 913 examination, leading to charges of insubordination and a second hearing. The second hearing officer determined that Dr. Johnson had cause to call for a second Section 913 exam and that plaintiff was required to appear for the exam or make arrangements to reschedule. Plaintiff did not [33] appeal this determination.

In fact, she appeared for a new examination by Doctors Kronick and Smith. Both Doctor Kronick and Smith found plaintiff unfit to teach based upon their

examinations. Therefore, another Section 3020-a hearing was scheduled, and plaintiff was notified.

Plaintiff again contacted witnesses and demanded retractions of their statements against her. Based on this activity, the charges were amended.

After a hearing at which plaintiff was represented by counsel and was presented with an opportunity to present witnesses and evidence on her own behalf, Hearing Officer Campagna found plaintiff mentally incompetent to teach. The plaintiff appealed. The New York State Supreme Court upheld the decision. The Court explicitly found that the hearing officer's decision was based on new evidence and not just a reshifting of old evidence as plaintiff had argued.

Plaintiff's Statement of Undisputed Facts makes statements in regard to the evidence at the third hearing. For example, paragraph thirty-one states:

"Doctors Smith and Kronick testified that plaintiff had been mentally incompetent when she was first examined prior to the first hearing, and that they disagreed with the findings of Hearing Officer Markowitz, [34] and that her condition was permanent and unchanging."

Plaintiff does cite the testimony of her own expert Doctor Tassinari, which she concludes was rejected by Hearing Officer Campagna. Doctor Tassinari testified that plaintiff's suspiciousness of the School District was

not an illogical response to the legal badgering and gossip mongering she had been subjected to for four years.

However, this evidence, even if true, is irrelevant because it does not go to question of whether the evidence at the first hearing was merely rehashed for the third hearing, which is the relevant inquiry.

In the third hearing, Hearing Officer Campagna considered evidence regarding plaintiff's mental state that was not available at the first hearing including, but not limited to, one, Doctor Johnson's concerns about plaintiff resulting from his investigation of the circumstances surrounding the decision of the first hearing officer.

Two, several undenied instances of bizarre aberrant actions by plaintiff characterized as stalking incidents during which she attempted to intimidate witnesses against her in the first hearing.

Three, after the third set of charges were lodged, confrontations by plaintiff against witnesses to obtain recantations.

[35] And, four, the reports of Doctors Kronick and Smith who conducted their Section 913 examinations of plaintiff after the first hearing and after the reports of attempted witness tampering were made.

Appendix B

The hearing officer explicitly considered whether these doctors hired by the School District were biassed and determined that their reports were professional and made in good faith. Based upon all of the evidence, including that set forth above which was not considered at the first hearing, Hearing Officer Campagna found in a forty-five page decision that the plaintiff was mentally incompetent to teach.

Plaintiff has failed to establish that only the same evidence or evidence available at the time of the first hearing was presented in the third hearing rendering the third hearing a sham. In fact, the record clearly demonstrates that new evidence was considered in the third hearing, of which plaintiff was given notice.

Plaintiff was represented by counsel. She had an opportunity to review the charges, which she did by calling Doctor Tassinari, and she took advantage of her right to appeal the adverse decision. Plaintiff received all due process that was due. Defendants are entitled to summary judgment.

Therefore, plaintiff's motion for partial [36] summary judgment is denied. Defendants' motion for summary judgment is granted, and the complaint is dismissed.

This is the decision of the Court. No written decision will follow. A summary order will be filed.

* * * *

APPENDIX C — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JUNE 13, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-5004-cv

MARCINE PALKOVIC,

Plaintiff-Appellant,

v.

MICHAEL J. JOHNSON, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, AVERILL PARK CENTRAL SCHOOL DISTRICT,

Defendants-Appellees.

June 13, 2008, Decided

JUDGES: PRESENT: HON. GUIDO CALABRESI, HON. BARRINGTON D. PARKER, Circuit Judges, HON. STEFAN R. UNDERHILL, District Judge.*

OPINION

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* Stefan R. Underhill , of the United States D istrict Court for the District of Connecticut, sitting by designation.

Appendix C

SUMMARY ORDER

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Northern District of New York (Hurd, *J.*), it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the judgment of the district court is **VACATED** and **REMANDED**.

Marcine Palkovic appeals the judgment entered after dismissal of her complaint for failure to state a claim upon which relief can be granted. Palkovic, formerly a tenured elementary school teacher, had alleged that defendants Michael J. Johnson, the Averill Park Central School District Board of Education, and the Averill Park Central School District (collectively "the District") violated her procedural due process rights because, after Palkovic prevailed at her first termination proceeding, they commenced a subsequent termination proceeding based upon the same evidence. We assume the parties' familiarity with the facts of the case, its procedural history, and the scope of the issues on appeal.

Palkovic was a tenured elementary school teacher in the Averill Park Central School District ("APCSD"). In April 1997, the District commenced a proceeding, pursuant to section 3020-a of the New York State Education Law, N.Y. EDUC. LAW § 3020-a, to terminate her employment on the ground of mental incompetence to teach ("first section 3020-a proceeding").

Appendix C

On August 23, 1999, the hearing officer at the first section 3020-a proceeding issued a comprehensive decision holding that the "District has failed to prove that [Palkovic] is mentally incompetent. . . ." Compl. at P 21. The hearing officer found that Palkovic "had been subjected to continued attack by the various personnel of the District and that her reaction was not proven to be a demonstration of paranoid disorder and obsessive compulsive traits." *Id.*

Less than five months after that decision, the District commenced a second proceeding to terminate her employment ("second section 3020-a proceeding"). Palkovic's second section 3020-a proceeding was assigned to hearing officer Eric Lawson. The District, however, believed Lawson was "not the hearing officer we want," and suggested they "work hard to get the most favorable hearing officer possible for the charge of 'unfit to teach.'" Compl. at P 31. To that end, on June 14, 2000, the District commenced a third proceeding to terminate Palkovic's employment ("third section 3020-a proceeding"). The third section 3020-a proceeding was commenced less than two months after the District commenced the second section 3020-a proceeding, and less than a year after the first section 3020-a proceeding concluded. Following a hearing on the second section 3020-a charges, Lawson issued a decision finding that Palkovic's actions did not constitute incompetence.

The hearing on the third section 3020-a charges, conducted by Hearing Officer Dennis J. Campagna, took place in January 2001. Much of the evidence that the

Appendix C

District presented in the third section 3020-a proceeding overlapped the evidence presented in the first section 3020-a proceeding. Specifically,

> [t]here was no evidence in the third § 3020-a proceeding that plaintiff's mental state had deteriorated from the time of her initial § 913 exam which resulted in the initiation of the first § 3020-a proceeding. Nor did [the District's experts] make a determination based on newly discovered evidence that was not available to the first § 3020-a hearing officer. Rather, they simply testified that they agreed with the findings of the District's psychiatric experts at the first § 3020-a hearing, that they diagnosed a mental condition already present at the time of the first § 3020-a hearing, and that they found hearing Officer Markowitz to be simply wrong, indeed not to understand psychological and psychiatric testimony.

Compl. at P 41. On February 23, 2001, Campagna issued a decision in which he found Palkovic to be mentally incompetent. This lawsuit followed.

In her complaint, Palkovic alleges three causes of action, all based upon the theory that the District violated her constitutional right to procedural due process of law. The District Court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted, holding in relevant part that

the repeated initiation of section 3020-a proceedings did not violate Palkovic's procedural due process rights because the third hearing was not a "sham" or *pro forma* hearing.

When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiff and decide whether the plaintiffs has pled a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007); *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007). The appropriate inquiry is not whether a plaintiff is likely to prevail, but whether the plaintiff is entitled to offer evidence to support her claims. *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005).

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, "no person may be deprived of life, liberty, or property without reasonable notice and an opportunity to be heard." *Karpova v. Snow*, 497 F.3d 262, 270 (2d Cir. 2007). "The opportunity to be heard must be 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). In this case, Palkovic alleges that she did not receive a meaningful hearing because the defendants "repeatedly initiated further § 3020-a proceedings until they achieved the result they desired." Compl. at P 50. The Complaint further alleges that "[t]here was no evidence in the third § 3020-a proceeding that plaintiff's mental

state had deteriorated from the time of her initial § 913 exam which resulted in the initiation of the first § 3020-a proceeding." Compl. at P 41. It also contends that Campagna had "not a scintilla of evidence before him that [Palkovic's] mental state had in fact changed," and that he nevertheless determined her to be mentally incompetent and unfit to teach based on "reports of [the District's experts], who said that her disorder was fixed and permanent since before the time when she was examined in the § 913 exam that resulted in the first § 3020-a proceeding." Compl. at P 42.

Without reaching the issue of whether Palkovic can succeed on a procedural due process claim, we conclude that the Complaint alleges "enough facts to state a claim for relief that is plausible on its face." *Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (*per curiam*) (quoting *Bell Atl. Corp.*, 127 S. Ct. at 1974) (internal quotations marks omitted). Because the Complaint's factual allegations are "sufficient to raise a right to relief above the speculative level," *Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 131 (2d Cir. 2007) (internal quotation marks omitted), Palkovic has met her burden to withstand a Rule 12(b)(6) motion.

For the foregoing reasons, we VACATE and REMAND for further proceedings.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 4, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 09-1316-cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of February, two thousand ten.

MARCINE PALKOVIC,

Plaintiff-Appellant,

v.

MICHAEL J. JOHNSON, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, AVERILL PARK CENTRAL SCHOOL DISTRICT,

Defendants Appellees.

Marcine Palkovic having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

Appendix D

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

s/ Catherine O'Hagan Wolfe
CATHERINE O'HAGAN WOLFE, Clerk of Court